IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1452

KIMBELL, INC., d/b/a FOODWAY, FURR'S, INC., SAFEWAY STORES, INC., and SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY,

Appellants,

—v.—

EMPLOYMENT SECURITY COMMISSION OF THE STATE OF NEW MEXICO and LANA JEAN NOLAN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTION FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") hereby respectfully moves pursuant to Rule 42 of the Rules of the Supreme Court of the United States for leave to file the attached brief *amicus curiae* in this case.

This application for leave is made in lieu of requesting and obtaining the written consents of all parties as authorized by Rule 42(1). Appellants filed the appeal herein on April 12, 1976. Thereafter, on April 28, 1976, appellees moved to dismiss for want of probable jurisdiction. As re-

ported at 44 U.S.L.W. 3685, the Court invited the Solicitor General on June 1, 1976, to file a brief in this case to present the views of the United States. It was that invitation, subsequently brought to the attention of the Chamber and its attorneys, which has prompted this motion. This motion is made, with brief attached, within four days of receipt of a copy of the Solicitor General's brief, thereby avoiding, we believe, any significant delay in the Court's consideration hereof.

The immediate interest of the Chamber stems from its current status as a full party or as *amicus curiae* in no less than four lawsuits now pending before the federal courts presenting the same generic issue involved on this appeal—whether the grant of unemployment insurance benefits to strikers under state statute contravenes the Supremacy Clause of the Constitution of the United States by impermissibly infringing upon the national labor policy guaranteeing both employers and employees the right to bargain freely without state interference and insuring government neutrality and non-interference in the collective bargaining process. These cases and the Chamber's status in each are as follows: *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Industrial Relations,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals filed,* 9th Cir., Mar. 3, 1976 (party plaintiff-intervenor); *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1973), *cert. denied,* 414 U.S. 858 and 414 U.S. 879, *on remand for trial to the United States District Court for Rhode Island,* Civil No. 4926 (party plaintiff-intervenor); *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105, Civ. No. 38644 (E.D. Mich.) (Chamber granted status of *amicus curiae* in pending trial); *Shell Oil Co.* v. *Brooks,* No. C. 74-1935 (W.D. Wash.) (party plaintiff). The outcome of the appeal herein

therefore is of direct and substantial interest to the Chamber because of its potential effect on the foregoing cases.

In all of the above-listed pending cases in which the Chamber is a party-intervenor or *amicus curiae,* and in *New York Telephone Company, et al.* v. *New York State Department of Labor, et al.,* 73 Civ. 4557, which has been tried and briefed in the United States District Court for the Southern District of New York and is presently *sub judice,* a full record documenting and measuring the impact on collective bargaining and on strikes of the unemployment insurance subsidy to strikers has been made at trial or is expected to be made thereat. In the case at bar no such record has been made and unless, as we contend, the language of this Court in *Super Tire* (see attached brief, pp. 15-16) is deemed to call for a summary reversal here, we submit that the record at bar offers no basis for a factual finding of infringement or noninfringement on the federal labor policy.

The basic underlying interest of the Chamber arises from these facts: The Chamber is a federation consisting of over 3,600 state and local chambers of commerce and professional and trade associations, and a direct business membership in excess of 58,000. An overwhelming majority of these members bargain collectively under the National Labor Relations Act, as amended ("the NLRA"). This bargaining is conducted under the policy (found by this Court to underlie that Act) that the government shall not intervene to upset the balance struck by Congress between the conflicting interests of the contending parties in a strike or other labor controversy. The substantiality of their interest, and therefore of the Chamber's interest, in any

case that involves a claim which could effect a departure from that policy needs no further elaboration.

Under these circumstances we respectfully ask leave to submit the attached brief at this stage of the case to present to the Court the reasons why (a) there should be a summary reversal of the decision below on the ground that it is clearly erroneous, or, in the event of any other disposition, (b) this Court should preserve for consideration by the courts below and, ultimately, for itself, on appropriately complete records, the question whether state legislation commanding the payment of unemployment insurance benefits to strikers is in constitutional conflict with the federal labor policy of governmental neutrality in labor disputes.

As a national organization whose membership is broadly representative of American industry and one which has devoted considerable research to the question at hand, the Chamber is in a unique position to present to this Court facts illustrative of the kind of proof that would be available on a fully developed record concerning the impact of unemployment insurance benefits on free collective bargaining and strikes. Its position in this regard is reinforced by its familiarity with the numerous pending lawsuits which address the issues of factual impact and constitutional conflict in depth and with completeness.

Dated: New York, New York
August 27, 1976

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1975

No. 75-1452

Kimball, Inc., d/b/a Foodway, Furr's, Inc., Safeway Stores, Inc., and Shop Rite Foods, Inc. d/b/a Piggly Wiggly,

Appellants,

—v.—

Employment Security Commission of the State of New Mexico and Lana Jean Nolan, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The question here presented is whether New Mexico's grant of unemployment insurance benefits to strikers conflicts with the federal policy of government neutrality in labor disputes, disturbs the balance of power between employers and unions in such disputes, and is thereby preempted under Article VI of the Constitution.

The Chamber of Commerce of the United States of America ("the Chamber") has applied for leave to submit this brief *amicus curiae* because the judgment below (which would validate such benefits) in its view materially alters and would indeed frustrate the accomplishment of the full purposes and objectives of the federal labor policy just described.

The immediate interest of the Chamber as a party-intervenor or as *amicus curiae* in four pending lawsuits posing the same generic question as the appeal herein and its underlying interest in defending, on behalf of its members, the existing policy of government neutrality in labor disputes against nullification or diminution, are set forth in greater detail in its motion for leave to file this brief.

The Chamber believes, and will argue, that the error in the holding below is so manifest as to call for summary reversal. It will urge, moreover, that in any event the case should be so dealt with by this Court as not to preclude consideration of the above-described Constitutional question in cases presently pending in the federal court system having fuller and more illuminating records than has the case at bar.

Summary of Argument

The federal labor policy of free collective bargaining and government neutrality in labor disputes is preemptive and supreme. State laws granting unemployment insurance benefits to strikers violate this policy and impermissibly and unconstitutionally disturb the balance of power between labor and management expressed in the national labor laws.

The grant of such benefits to strikers impacts substantially on collective bargaining and strikes. For it provides subsidy for the strikers and, at the same time, increases the employer's financial obligations by imposing upon him, through unemployment insurance tax rates set on the basis of experience rating, the full costs thereof. In effect, the employer is forced to finance a strike against himself.

The record below does not present and the decision does not consider the impact of benefits on collective bargaining and strikes. Nor does the decision consider or apply the leading labor preemption decisions of this Court. The impact of monetary benefits for strikers, however, may be judicially noticed as it was in this Court's decision in the *Super Tire* case (see p. 15, *infra*)[1] and on that basis alone the decision below should be reversed on the ground it is clearly erroneous. This conclusion is confirmed by the subsequent decision of this Court in *Wisconsin* (see p. 11, *infra*) which calls for invocation of the preemption doctrine here and, at the very least, for an order vacating the decision below with a remand for reconsideration in the light thereof.

The Solicitor General's view that legislative history summarily disposes of the preemption doctrine as far as unemployment insurance benefits are concerned is at odds with decisions of the Court of Appeals for the First Circuit, with federal district court decisions in Hawaii, Michigan and New York and, we contend, with the history itself. The opinion in *Grinnell* (see p. 13, *infra*), which gave careful scrutiny to the legislative history as a whole (including all

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[1] This case involved welfare benefits where the impact, if anything, is less than that of unemployment compensation (see p. 16, *infra*).

of the portions thereof referred to by the Solicitor General), concluded that "unambiguous congressional intent is lacking" therefrom.

The inherent conflict between unemployment compensation for strikers and the federal labor policy has been amply demonstrated in cases which have been tried, and is expected to be so demonstrated in several other cases now pending before the federal courts. These cases will provide fuller and more complete records than the relatively bare record at bar. The disposition of this case, therefore, should not foreclose subsequent determinations in the pending cases where the issue is more completely and less abstractly presented.

ARGUMENT

I.

The Grounds for a Summary Reversal Here

A. *The Federal Labor Policy Guarantees Employers and Unions Government Neutrality in Labor Disputes and the Right to Engage in Free Collective Bargaining.*

There are few areas of federal law, if any, which have been vouchsafed the degree of judicial protection from state interference as have labor-management relations and collective bargaining. This Court over the years has repeatedly confirmed its undeviating intent to guard these areas from state intrusion.[2] In the Court's most recent

[2] *E.g., San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Teamsters Local 24* v. *Oliver*, 358 U.S. 283 (1959); *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964); *Amalgamated Association of Street, Electric Ry. & Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971).

pronouncement concerning labor law preemption, it once again affirmed the preemptive and supreme quality of the federal labor policy. *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission* —— U.S. ——, 44 U.S.L.W. 5026 (June 25, 1976) (hereafter "*Wisconsin*").[3]

Free collective bargaining, as insured by the federal labor policy, is premised on the concept of government noninterference and neutrality. While the government "acts to oversee and referee the process of collective bargaining," it leaves "the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). Indeed, the right to bargain collectively clearly contemplates economic warfare and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 309 (1965); *Wisconsin*, 44 U.S.L.W. at 5031-32. For, as a practical matter, it is the use of economic force or the availability of such force in reserve that acts as the prime motive or catalyst under the federal scheme for reaching agreements in collective bargaining. *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 489 (1960).[4]

[3] Other recent Court decisions provide further examples of the Court's intent to guard against state interference with the delicate federally-created balance of power in the labor relations area by invoking the doctrine of federal labor law preemption. *E.g., Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974); *Beasley* v. *Food Fair, Inc.*, 416 U.S. 653 (1974).

[4] As quoted by this Court in its recent *Wisconsin* decision (44 U.S.L.W. at 5031):

> ". . . the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S., at 495.

States are forbidden to "upset the balance of power between labor and management expressed in our national labor policy." *Morton,* 377 U.S. at 260; *Wisconsin,* 44 U.S. L.W. at 5032. Certainly state laws (such as the unemployment insurance law here under review) resting upon a state's views concerning the accommodation of the respective interests of employers, employees, unions and the public in collective bargaining and labor disputes would clearly fall within the area occupied by the federal labor laws and, accordingly, cannot stand. Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1352-54 (1972).

With but few exceptions the federal and state courts have uniformly preempted and invalidated state action whenever it could be shown that it had a significant effect, whether direct or indirect, upon the parties in collective bargaining or in a labor dispute. This Court recently has so ruled in *Wisconsin, Connell* and *Austin* (see notes 2 and 3, *supra*) and earlier in *Morton, UAW* v. *O'Brien,* 339 U.S. 454 (1950), and in a host of other decisions. Other courts have done so in *General Electric* v. *Callahan,* 294 F.2d 60 (1st Cir. 1961), *petition for cert. dismissed,* 369 U.S. 832 (1962); *Oil, Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.,* 332 F.2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett,* 137 F. Supp. 667 (W.D. Mich. 1955); *Delaware Coach Co.* v. *Public Service Commission,* 265 F. Supp. 648 (D. Del. 1967); *Rochester Telephone Corp.* v. *Levine,* —— F. Supp. ——, 90 L.R.R.M. 3032 (W.D.N.Y. 1975); *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance,* 349 Mass. 390, 208 N.E. 2d 516 (1965).

B. *The Legislative History Does Not Create an Exception to Federal Labor Policy in the Case of Unemployment Benefits for Strikers.*

After reviewing the relevant legislative history, the First Circuit concluded, in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 454 (1973), that:

> [t]he existing legislative record is not sufficiently clear to establish Congressional intent either way. . . . .

and, at 457, that:

> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> . . . [*U*]*nambiguous Congressional intent is lacking.* . . . [Emphasis supplied]

The Solicitor General disagrees, arguing in his memorandum here that the legislative history is conclusive. But the court below in this case never reviewed or even considered the area of legislative history. And every court that has (*e.g.,* the federal district courts in *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105 (E.D. Mich. 1972), *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Industrial Relations,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals filed,* 9th Cir., Mar. 3, 1976) and *New York Telephone Co., et al.* v. *New York State Dept. of Labor, et al.,* 73 Civ. 4557 (S.D.N.Y., Mar. 26, 1975), and the First Circuit in *Grinnell*) reached a conclusion contrary to that of the Solicitor General, namely, that the relevant legislative history is inconclusive.

If any inferences may be fairly drawn from the legislative history, we submit, they are that (a) Congress in the National Labor Relations Act intended to strike a balance among the respective interests of the parties in collective bargaining (see *Wisconsin,* 44 U.S.L.W. at 5031-32), (b) Congress never intended that the states would grant unemployment compensation to strikers, and (c) where Congress intended to assist strikers financially, it has expressly done so.

In passing the Social Security Act of 1935, Congress did not anticipate that the unemployment compensation program would be extended by the states to strikers. For the entire unemployment insurance system was established in response to the experience of the Great Depression (*Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586 (1937)) to "cushion the shock of seasonal, cyclical, or technological unemployment" for persons involuntarily unemployed. *ITT Lamp Division* v. *Minter,* 435 F.2d 989, 994-95, *cert. denied* 402 U.S. 933 (1971). The objective of the Congress, as noted by this Court, "*was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.*" *California Dept. of Human Resources Development* v. *Java,* 402 U.S. 121, 130 (1971) (emphasis supplied). Strikers do not fall within any of these categories of beneficiaries contemplated by Congress.

Thus, it was not unexpected that in 1936 the Federal Social Security Board, which in its advisory role was called upon to draft a model unemployment insurance bill to aid the states in drafting legislation to conform with the federal enabling law, therein expressly denied benefits to strikers. *Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types,* § 1(5) (rev. ed. Jan. 1937).

Consistent with this view is the fact that when Congress acted to legislate a local unemployment insurance law for the District of Columbia, it enacted a law which denied benefits to strikers. D.C.C. § 46-310 (f).

As for Congress' grant of benefits to strikers under the Food Stamp Act and Railway Labor Act and the Solicitor's argument based thereon, the First Circuit, in *Grinnell,* 475 F.2d at 457, reviewed those laws and concluded that no reasonable inference could be drawn either way, noting in part that:

> given the ability of Congress to articulate that intent [of granting benefits to strikers] in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. . . .

C. *As a Matter of Law, the Grant of Unemployment Insurance Benefits to Strikers Unconstitutionally Violates the Federal Labor Policy of Government Neutrality in Labor Disputes and Collective Bargaining.*

The impact of welfare assistance to strikers was the subjest of judicial notice by this Court in *Super Tire Eng. Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974), where it was observed:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

> The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

The potential impact of unemployment insurance benefits for strikers on collective bargaining and on work stoppages, if anything, is more pervasive than that of welfare assistance.[5] For unemployment compensation is granted as of right and not on the basis of need; *it, moreover, not only provides subsidy for the strikers but imposes the cost thereof on their employers.*[6] Under experience rating, unemployment insurance tax rates for each employer are set on the basis of his individual experience, in effect requiring him to pay for the benefits collected by his employees or former employees. Thus, experience rating is a conduit

[5] A decision on the issue of federal labor law preemption was reached after a plenary trial on the merits in only one federal court case involving the payment of unemployment insurance benefits to strikers, *Hawaiian Telephone*. The Hawaiian law there in dispute, in all material respects, was virtually identical to the New Mexico law here under challenge. The court in the *Hawaiian Telephone* case indicated that the above-quoted passage of this Court in *Super Tire* might eliminate any need for a factual inquiry on the issue of impact of unemployment compensation for strikers. 405 F. Supp. at 277. Nevertheless, believing that such an inquiry might be of assistance to the court, it ordered one conducted. After a trial the court concluded that the payment of benefits to strikers interferes with free collective bargaining and government neutrality in labor disputes, as insured by the federal labor policy, and thereby violates the Supremacy Clause of the United States Constitution. *Id.* at 290.

[6] Welfare programs, in contrast, are funded by the community at large and not by the struck employers themselves.

through which the employer's own funds are funnelled to subsidize his striking employees. This circumstance, without more, requires invalidation of state statutes which pay unemployment compensation to strikers, for the National Labor Relations Board has long held that an employer may *not* be required to subsidize a strike against himself. See, *e.g., Southwestern Electric Power Co.,* 216 N.L.R.B. No. 88, 88 L.R.R.M. 1342 (1975); *General Electric Co.,* 80 N.L.R.B. No. 90, 23 L.R.R.M. 1094 (1948). In the latter decision, the Board stated (23 L.R.R.M. at 1095):

> It is axiomatic that the Respondent [Employer] is not required under the Act [NLRA] to finance an economic strike against it by remunerating the strikers for work not performed.

This Court's observations in *Super Tire,* when viewed as they should be in the light of the established and controlling precedents in the area, call for summary reversal of the decision below on the ground that it is clearly erroneous.

That the Supreme Court of New Mexico decided as important an issue as is presented in this case and disposed of the applicability of the powerful federal labor law preemption doctrine in a ten-line footnote—without the benefit of any discussion of its underlying rationale, of the legal bases it relied upon, or of this Court's labor preemption decisions—further supports the conclusion that a summary reversal is appropriate here.

Leading to the same conclusion is this Court's recent decision in *Wisconsin.* For the labor preemption principles

discussed therein[7] clearly control the outcome of this case and require reversal of the decision below. This Court has summarily reversed in cases which it believed to be controlled by one or more of its own recent decisions. *E.g.*, *United States* v. *Haley*, 358 U.S. 644 (1959); *Schackman* v. *California*, 388 U.S. 454 (1967). It is respectfully suggested that, at the very least, the *Wisconsin* decision requires that the decision herein below be vacated with a remand for reconsideration in light of the principles stated therein. *Cf. Norton* v. *Weinberger*, 418 U.S. 902 (1974); *Sutherland* v. *Illinois*, 418 U.S. 907 (1974).

II.

Abundant factual proof of the inherent conflict between unemployment compensation for strikers and free collective bargaining has either been adduced or is expected to be adduced in cases presently pending before the federal courts. In no event should the decision on this appeal preclude or prejudice intermediate and ultimately final review of those cases and the factual records made therein.

As previously noted, the preemption issue posed on this appeal was the subject of a decision reached after a plenary trial on the merits in only one federal court case involving the payment of unemployment insurance benefits to strikers.

[7] For example, in discussing what is forbidden to the States in legislating on matters which might affect labor relations, this Court remarked in its recent *Wisconsin* decision that a state "may not add to an employer's federal legal obligations in collective bargaining. . . ." 44 U.S.L.W. at 5030. The increased financial burdens on employers directly flowing from the payment of unemployment benefits to his striking employees, we submit, impermissibly adds to the employer's obligations in collective bargaining.

Hawaiian Telephone, supra. The trial in that case covered aproximately seven days and involved extensive testimony by employer representatives, union officials and expert witnesses. Substantial documentary evidence was amassed on the issue of the impact of the availability and payment of benefits on collective bargaining and strikes. For example, one union document in evidence, issued after the strike in that case, viewed the company's court challenge to the Hawaiian law as an *"attempt to undermine our [the union's] ability and right to strike in the future"* and called upon the membership to make sure that the court action "doesn't *cripple their own strikes in the future.*" Quoted in *Hawaiian Telephone*, 405 F. Supp. at 281-82.

After a thorough review of the documentary evidence as well as the testimony of both lay and expert witnesses on the issue of the law's impact on collective bargaining, the court summarized its factual findings as follows:

> From the preceding, as well as the facts found in this court's prior decision, this court finds: (1) 16.1% of total man-days lost are attributed to strikes in which compensation was paid; (2) the presence of potential unemployment benefits probably tends to lengthen strikes; (3) the employer's approach to bargaining is affected by the potential additional tax burden; (4) potential increases in tax contributions tend to make employers settle when they otherwise would not; (5) unions are given access to valuable confidential information about the success of strikes during the course of state administrative hearings on benefits;[8] the ap-

[8] Under both Hawaii's and New Mexico's laws the employer may be required in a labor dispute to supply information concerning the extent of its operations, if any, during the labor dispute.

pealability of those hearings is used as a bargaining chip; (6) employee finances are key determinants of the success of strikes and strike threats; (7) unemployment benefits, if granted, provide a large percentage of striking workers' take-home pay; (8) union members and officials perceive that unemployment benefits contribute to their ability to strike and maintain it. Therefore, this court finds that Hawaii's unemployment insurance statute as interpreted by the Hawaii Supreme Court palpably affected the labor relations between TELCO and the IBEW, and similarly affects all other Hawaii employers and unions in every collective bargaining conflict and "is a factor lurking in the background of every incipient labor contract" [8] where the employer may desire to carry on business during a strike. [405 F. Supp. at 282]

[8] *Super Tire Eng. Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974).

Thus the trial in *Hawaiian Telephone* served only to confirm the existence of substantial impact along the very lines suggested in this Court's observations in *Super Tire*, quoted herein at pp. 15-16, *supra*.

This led the *Hawaiian Telephone* court to conclude that the availabilty and payment of unemployment insurance to strikers under Hawaii's law contravenes the Supremacy Clause of the United States Constitution. For "[o]n its face . . . Hawaii's statute irreconcilably intrudes into the federal process of free collective bargaining" and clearly frustrates Congress' scheme that the collective bargaining process must be free from state interference. 405 F. Supp. at 290.

These conclusions, we submit, are equally applicable to the virtually identical New Mexico law here involved.

Grinnell's call for a detailed evidentiary hearing also provided the basis for the denial of defendant's summary judgment motion in the *New York Telephone* case, *supra*. That case thereupon came to trial on this issue and is now *sub judice*. The trial there consumed nine trial days wherein plaintiffs, through lay and expert witnesses and through extensive documentary evidence, followed the evidentiary criteria for proving impact suggested in the *Grinnell* case.[9]

In the *New York Telephone* case the evidence showed, for example, that unemployment benefits in New York were paid to strikers, during the period 1965 through 1974, in approximately 14% of all strikes, which involved in excess of 50% of the total man-days lost in New York due to strikes. It was stipulated by the parties in that case, moreover, that upwards of 48.5 million dollars in benefits were paid to some 33,500 strikers during the seven-month strike which precipitated that lawsuit, directly resulting in a cost to the employers there of approximately 18 million dollars in unemployment insurance tax payments in 1972

[9] On the issue of impact, alone, plaintiffs called three expert witnesses and one lay witness, offered in evidence some 411 documents and submitted for the court's consideration a ten-year statistical study on the impact of unemployment insurance in lengthening strikes in New York State and Rhode Island and a survey of the attitudes of the full-time work force in New York State on the subject of unemployment compensation for strikers. Defendants called eight expert witnesses and introduced into evidence 126 exhibits. That the New York statute there under challenge, as well as its counterpart in Rhode Island, "could have more impact on the bargaining process than does the New Mexico law here" was recognized by the Solicitor General in his brief on this appeal (p. 8, n. 6).

and 1973 alone, in excess of what would have been due and payable if no benefits had been paid to their striking employees.[10]

Written statements emanating from the union leadership in the New York Telephone strike, and received in evidence at the trial, (a) stated that "the fact that more than 80% of the [union] membership stayed together for 218 days [on strike] is simply incredible" and in the judgment of the union's Vice President "it is a testimonial to three phenomena," of which the second (after the "dedication and spirit of the strikers") was "Unemployment Insurance," (b) described unemployment insurance as their [the strikers'] "strike weapon" and the company's lawsuit challenging the legality of such benefits to strikers as "an attempt to undermine any future strike effort," and (c) declared during the course of the strike that "New York State Unemployment Compensation is a tremendous assist to our members."[11]

Other cases involving challenges to state laws granting unemployment insurance benefits to strikers are *Grinnell Corp.* v. *Hackett*, 475 F.2d 449 (1st Cir. 1973), *cert. denied*, 414 U.S. 858 and 414 U.S. 879 (cross-motions for preliminary injunction and for dismissal of the complaint denied); *Westinghouse Broadcasting Co.* v. *Commonwealth of Massachusetts*, Civil Action No. 76-1409-S (D. Mass., Apr. 26, 1976) (motion for temporary restraining order denied); *Dow Chemical Co.* v. *Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972) (motion to dismiss denied); and *Shell Oil Co.* v. *Brooks*, No. C. 74-1935 (W.D. Wash.) (cross-motions for summary judgment pending).

[10] The imposition on the employer of the cost of the unemployment insurance subsidy for the strikers led the *Hawaiian Telephone* court in that case to remark: "The strikers' position when a strike is called, with the State's assist, becomes one of 'heads I win, tails you lose'!" 405 F. Supp. at 260.

[11] These are but a few examples of the extensive documentary evidence on this subject which is part of the record evidence in the *New York Telephone* case. A few of the many examples of union statements in strikes other than the telephone strike are excerpted and set forth for the Court's convenience in an appendix to this brief. They include statements by Joseph Moloney and I. W. Abel, as representatives of the United Steelworkers of America, and by the United Automobile Workers.

The First Circuit in *Grinnell* reversed the decision of the district court below which had granted defendants' motion to dismiss the complaint and had denied a preliminary injunction requested by the employer. Holding that it could not decide the case as a matter of law on the record before it, the court remanded it with instructions to conduct a full hearing ("a macrocosmic inquiry") into the federal preemption issues outlined in its opinion. Since "unambiguous congressional intent" is lacking, the court concluded, the district court must consider whether the payment of unemployment compensation "palpably infringes" on the federal labor policy and, if such infringement is found, whether the state's interest "in cushioning the impact of unemployment" is stronger than the federal interest in "untrammeled collective bargaining." The court thereupon suggested the type and extent of evidence it felt was appropriate in a trial of these issues.[12] At the writing of this brief, the *Grinnell* case has not come to trial.

The *Dow* decision (denying defendants' motion to dismiss) was cited with approval and relied on by the First Circuit in *Grinnell* to support the employer's federal preemption cause of action against the motion to dismiss

[12] The court called for statistical evidence on strike duration and attitudinal and opinion surveys, among other proofs of impact.

therein. The *Dow* court, after noting jurisdiction, concluded (1) that the legislative history provided no definitive statement of congressional intent and (2) that the court could not decide the infringement issue as a matter of law on the pleadings before it. This case is expected to be tried before the year's end.

The inadequacy of the record before it was also the basis for the recent decision (April 26, 1976) of a federal district court in Massachusetts in the *Westinghouse Broadcasting* case. There the court denied the employer's motion for a temporary restraining order to enjoin the continued payment of unemployment compensation to strikers (under a statute similar to the Hawaiian and New Mexican statutes) on the ground that the First Circuit's opinion in *Grinnell* required a detailed evidentiary hearing on the issue of infringement.[13]

The influence of unemployment insurance on collective bargaining is, we submit, wide-spread and ever-growing. Two states grant benefits outright in all strikes after a waiting period of seven or eight weeks (Rhode Island and New

[13] The inadequacy of the record also led a state court in Pennsylvania to reject an employer's challenge on federal preemption grounds to the payment of unemployment compensation to employees locked out during a labor dispute. *Unemployment Compensation Board of Review* v. *Sun Oil Co. of Pa.*, 338 A.2d 710, 90 L.R.R.M. 2485 (Pa. Comm. Ct. 1975) *cert. granted by Sup. Ct. of Pa. and case pending briefing and oral argument.* The court there concluded that Sun Oil's argument "sounds plausible but it lacks evidentiary support," noting that this was probably explained by the failure of the company to raise the preemption issue below. In the face of a barren record, a Lousiana state court has also declined the opportunity to invalidate the payment of benefits during a lockout in *National Gypsum Co.* v. *Louisiana Dept. of Employment Security*, 313 So. 2d 527 (La. Sup. Ct. 1974), *appeal dismissed for want of properly presented federal question*, 423 U.S. 1009 (1975).

York) and some 29 states have laws similar to those of New Mexico and Hawaii which grant benefits, without an extended waiting period, but solely where the employer operates during the strike.

Before leaving this discussion of the pending unemployment insurance labor prememption cases, it should be emphasized, that the *Hawaiian Telephone* decision (now on appeal to the Court of Appeals for the Ninth Circuit) is not the first case in which a court has nullified state eligibility requirements for unemployment insurance benefits because they clashed with the federal labor policy. Indeed, this Court did so in *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235 (1967).

CONCLUSION

For the foregoing reasons, exercise of the Court's power to order summary reversal is amply warranted here. Should the Court conclude, however, that summary reversal is inappropriate because of the absence of a fully developed record on the issue of impact, or for any other reason, it should, we urge, dispose of this case in a manner which preserves for consideration by the courts below and, ultimately, by itself, in other cases having appropriately complete records, the generic labor preemption question here presented.

This Court recently so preserved the preemption issue involved in the *National Gypsum* case (see p. 24, n. 13, *supra*) by qualifying its dismissal there with the words "for want of a properly presented federal question." And, in *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 575

(1947), this Court dismissed an appeal, after briefing and argument, since the federal constitutional issues were found to "come to us in highly abstract form."

Respectfully submitted,

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APPENDIX

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Statements of Union Officials Concerning the Impact of Unemployment Insurance.

REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON INDUSTRIAL AND LABOR RELATIONS for the Year 1959-1960, Legislative Document (1960) No. 32, pp. 224-27, Statement of Joseph Molony, on Behalf of the United Steelworkers of America:

> [I]f he [a striker] were denied these [unemployment insurance] benefits then it is not to be unexpected if such people might easily become public charges because the average working man in our State is unable to accumulate sufficient savings to carry him for any extended period of . . . strike. So, it is conceivable that he might become a public charge. Then . . . the employer might also conceivably be relieved of some taxation but the people of the entire State would then be subject to taxation to assist these people who were in distress as a result of . . . strike.
>
> So I'm here to express to you and to your distinguished colleagues the feelings of the membership of my union, and the feelings I do believe as expressed by Mr. Corbett of all of labor that we are unalterably opposed to denying a striker unemployment insurance.
>
> • • • • •
>
> If . . . we must renew the strike. . . . [t]hen it would be a disaster. . . . It would be damaging beyond description to the Steelworkers Union if the State Legislature . . . denied our membership the right to unemployment insurance.

U.S. News and World Report, October 3, 1960, article, "116 Days on Strike—45 Millions in Public Aid," quoting statements of I. W. Abel, then Secreary-Treasurer (now President) of the United Steelworkers of America, at that union's 1960 national convention, concerning the union's 1959 strike:

> It is Mr. Abel's estimate that about 45 million dollars in relief and unemployment benefits was obtained from public agencies in that strike. This aid, in his words, "provided the food, shelter and welfare services that made the strike endurable. The sum exceeded by far the amount that the union poured into the districts and the locals. Had the union not secured assistance for its members from these agencies, the union's treasury would have been much more severely depleted."
>
> • • • • •
>
> "Public assistance agencies vary widely from State to State, both in the adequacy of legal coverage and the reasonableness with which local welfare officials . . . grant assistance. As in the case of unemployment compensation, adequate public-assistance standards are only secured by political activity. Once secured, they must be continually watched so that public officials continue to administer the laws fairly."
>
> • • • • •
>
> The New York experience, Mr. Abel said, offers a political lesson for his members in other states. He reported: "This staggering sum [9 million dollars in unemployment insurance benefits] of assistance to our

> striking members in New York clearly demonstrates the need for political activity to legislate humane and fair unemployment-compensation laws."

UAW Ammunition, June 1957, article, "Industrial Unions Adapt to the Age of Automation":

> [T]he union's leadership decided to take advantage of the unemployment compensation law and called the tool and die workers out on strike alone.
>
> Then under the law, production workers, who got laid off as the result of the shut downs which would certainly follow, would be entitled to unemployment compensation.
>
> This was planned to exert pressure on GM, since it would be caught tooling up for a new model. The production workers, it was foreseen, would be relatively cushioned by unemployment compensation payments. Thus, a double set of facts made the strike strategy effective.
>
> The unemployment compensation law then (since the law has been amended so the situation does not apply) allowed workers in a plant on strike to collect unemployment compensation if they were not parties to the dispute.
>
> • • • • •
>
> As the strike began to bite, GM started to close down all over the country. The laid off production workers then collected their compensation. At the same time they thronged to picket lines to support the skilled workers' strike.